Supreme Court, U.S.
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No. 99-1399

IN THE

Supreme Court of the United States

BONNIE BRIAR SYNDICATE, INC.,

Petitioner,

v.

THE TOWN OF MAMARONECK, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS, STATE OF NEW YORK

RESPONDENTS' BRIEF IN OPPOSITION

ROBERT S. DAVIS
Counsel of Record
JAMES M. ALTMAN
JUDITH M. GALLENT
ROBINSON SILVERMAN PEARCE
ARONSOHN & BERMAN LLP
Attorneys for Respondents
1290 Avenue of the Americas
New York, New York 10104
(212) 541-2000

158629

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

26PP

PARTIES TO THE PROCEEDING

The composition of the Town Board of the Town of Mamaroneck (the "Board") has changed. Valerie O'Keeffe has replaced Elaine Price as the Supervisor of the Town. Kathy O'Flinn and Paul Ryan are no longer members of the Board; Phyllis Wittner, Judith Myers, Ernest Odierna and Nancy Seligson have become members.

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STATEMENT OF THE CASE

The Town of Mamaroneck, the Board, and the individual members of the Board (collectively, "Respondents") respectfully submit this brief in opposition to the Petition For Writ of Certiorari (the "Petition") filed by Bonnie Briar Syndicate, Inc. ("Petitioner"). Petitioner seeks to overturn the judgment of the New York Court of Appeals (the "Decision") dismissing its claim that Respondents' rezoning of 430 acres as a private Recreation Zone effected an unconstitutional taking. The rezoned property consists of Petitioner's approximately 150 acres (the "Property"), on which the Bonnie Briar Country Club is situated, and the 280-acre Winged Foot Golf Club ("Winged Foot") (together, the "Golf Course Properties"). Thus, contrary to Petitioner's assertion, the Property is not the only land included within the Recreation Zone. Indeed, the Property constitutes only 35% of the area rezoned by Local Law 6.

The rezoning was the culmination of a 30-year comprehensive planning process at the local, state, and federal levels out of which three objectives emerged repeatedly with respect to the appropriate use of the Golf Course Properties: maintaining open space, preserving recreation resources and controlling flooding. *See* R701[1], 704, 707, 709, 148, 711, 713, 710-711, 150, 628. The record unequivocally demonstrates that Local Law 6 substantially advances these three Town interests, the legitimacy of which Petitioner concedes, while permitting the Property to be developed and used in the same economically viable manner as it has been for the last 70 years.

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1. "R" refers to the Record on Appeal.

The prior R-30 zoning of the Golf Course Properties permitted the development of as many as 125 and 285 residential units on the Property and on Winged Foot, respectively. Such dense development would obliterate the only remaining large open spaces in the Town, eliminate two significant recreation resources for Town and area residents, and increase flooding.

In 1993, three and one-half years into the Board's four year rezoning process, and after owning the Property for more than 70 years without attempting to develop it for residential use, Petitioner submitted an incomplete application for approval to construct either a 71-lot subdivision with an 18-hole golf course or a 130-lot subdivision that eliminated the golf course and virtually all open space on the Property. R607-608.[2] Six months later, when the Town Board adopted required findings under the State Environmental Quality Review Act, Petitioner still had not submitted a complete application. R608.

After the adoption of Local Law 6, Petitioner commenced this lawsuit alleging, among other things, that Local Law 6 effects a taking of the Property because it does not substantially advance a legitimate government interest. Notwithstanding its claim here that the Court of Appeals deprived Petitioner of its opportunity for a trial, Petitioner moved for partial summary judgment on this claim and

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2. There is no basis in the record for Petitioner's assertion that it had an expectation of developing the property for residential use "dating back to 1922." Petition at 1. The only evidence of such expectations submitted by Petitioner dates from 1986. R1341. With respect to the preceding 64 years, the record indicates only that the Property was used as a private golf club pursuant to a lease voluntarily entered into by Petitioner. *Id.*

Respondents cross-moved for a judgment dismissing it. The Supreme Court, Westchester County (the "Motion Court") granted Respondents' cross-motion and denied Petitioner's motion, and the Appellate Division, New York's intermediate appellate court, affirmed. Thereafter, the New York Court of Appeals affirmed the conclusion of the Appellate Division that Local Law 6 does not effect a taking of the Property because it substantially advances legitimate Town interests.

Petitioner's claim that Local Law 6 effects a taking of the Property because it deprives Petitioner of substantially all of the economic value of the Property was not addressed in the initial cross-motions for summary judgment. Subsequently Respondents moved separately for summary judgment dismissing this claim on the ground that Petitioner's own appraisal indicated that the rezoning resulted in a decrease in the value of the Property of only 33%, R1291, and even with the rezoning, the Property generated a rate of return of 7.2%, thus outperforming by a wide margin similar properties in the general market area, R1292-1293. The Motion Court denied Respondents' motion on the ground that there existed unspecified "material and triable issues of fact. . . ." R1103-1104. The Appellate Division reversed, holding that Petitioner's own appraisal demonstrated that the Property was "capable of earning a reasonable return and was not deprived of 'all but a bare residue' of value." R1411. Petitioners did not appeal that determination to the Court of Appeals and, therefore, it cannot be brought before this Court.

REASONS FOR DENYING THE WRIT

I.

THE COURT SHOULD DENY THE WRIT BECAUSE LOCAL LAW 6 DOES NOT UNFAIRLY SINGLE OUT PETITIONER TO BEAR THE BURDEN OF SOLVING A COMMUNITY-WIDE PROBLEM

In Point I, Petitioner argues that this Court should grant certiorari because Local Law 6 impermissibly singles out Petitioner to bear the burden of providing public benefits, rather than alleviating problems that residential development of the Property would create. *See* Petition at 14. This argument is meritless for three reasons.

First, Petitioner's "singling out" argument confuses a policy underlying the Takings Clause with the legal rule expressing that policy. The Takings Clause evolved, in part, "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. . . ." *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 123 (1978). Although that rationale is part of the conceptual underpinning of the takings doctrine, it is not, as Petitioner suggests, an independent test for determining the constitutionality of a town's zoning ordinances.

Although concerns about proportionality, such as those advanced by Petitioner, "animate the Takings Clause," this Court has not elevated that concern to a test of constitutionality beyond the special context of development-related exactions. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 119 S. Ct. 1624, 1635 (1999). Rather, a

generally applicable zoning regulation not involving exactions, such as Local Law 6, "does not effect a taking if [1] it 'substantially advance[s] legitimate state interests' and [2] does not 'den[y] an owner economically viable use of his land.' " *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987) (*quoting Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)). A zoning ordinance that meets this legal standard is constitutional. It does not unfairly single out affected property owners because the second prong of the *Agins* test ensures that affected property owners do not suffer too great an economic loss.

Second, Petitioner's "singling out" argument is contradicted by the facts — the Property is not the only private property included in the Recreation Zone. To the contrary, all large privately-owned open spaces in the Town are included in the Recreation Zone. Of the approximately 430 acres in the Recreation Zone, only 149 — approximately 35% — are owned by Petitioner.

A zoning regulation does not effect a taking simply because it imposes burdens on a small number of parcels. "[Z]oning laws often affect some property owners more severely than others but have not been held to be invalid on that account." *Penn Central*, 438 U.S. at 133-34. As long as the regulation treats similarly situated parcels the same and substantially advances a legitimate government interest, the regulation does not effect a taking because only a few parcels are affected. *See id.* at 133-34; *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1022-23 & 1071-73 (1992) (Stevens, J. dissenting).[3] Indeed, this Court has rejected

3. *See also Pennell v. City of San Jose*, 485 U.S. 1, 20 (1988) (Scalia, J., dissenting) ("Traditional land-use regulation (short of

(Cont'd)

takings challenges to regulations that "uniquely burdened" only one or two parcels. *See, e.g.*, *Penn Central*, 438 U.S. at 133 (*citing Hadacheck v. Sebastian*, 239 U.S. 394 (1915)) (ordinance prohibiting operation of only two brickyards within a district encompassing three miles did not effect a taking).[4] Because Local Law 6 applies to all large privately held open spaces lying wholly within the Town and substantially advances the Town's legitimate governmental interests, it does not unfairly force Petitioner to bear public burdens.

Third, Petitioner's complaint — that the Court of Appeals improperly rejected its contention that Local Law 6 impermissibly singles it out to bear the burden of providing a community-wide benefit — is nothing more than a disagreement with the Court's exercise of judgment as to that issue on a particular set of facts. The argument does not present an issue of wide applicability with significance beyond the context of this case. Such a narrowly circumscribed mixed issue of law and fact does not merit the Court's review. *See* Supreme Court Rule 10.

(Cont'd)
that which totally destroys the economic value of property) does not violate [the principle against forcing some alone to bear public burdens] because there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy.")

4. Although the validity of the regulation upheld in *Hadacheck* has been explained in terms of its prevention of a nuisance, in *Lucas* the Court explained that " '[h]armful or noxious use' . . . was . . . simply the progenitor of our more contemporary statements that 'land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests. . . .' " 505 U.S. at 1023-1024 (citations omitted).

II.

THIS IS NOT AN APPROPRIATE CASE IN WHICH TO CLARIFY THE TAKINGS STANDARD BECAUSE LOCAL LAW 6 PASSES CONSTITUTIONAL MUSTER UNDER ANY STANDARD

In Point II, Petitioner argues that the Court should grant the Writ because the first prong of the *Agins* test — that a taking occurs if a regulation fails to "substantially advance legitimate state interests" — is in urgent need of explication. *See* Petition at 17. Because New York appellate courts have held that Local Law 6 satisfies that standard, no matter how stringently it is construed, this is not an appropriate case for the Court to provide such guidance.

The Court of Appeals rejected Petitioner's argument that in determining whether a zoning regulation effects a taking, a court must determine whether there is an "essential nexus" between the legitimate governmental interest that the regulation was enacted to serve and the means chosen to achieve those ends. Instead, the Court of Appeals read this Court's opinion in *Del Monte Dunes* as limiting the applicability of *Nollan*'s heightened scrutiny to regulatory takings cases involving exactions and reaffirming the continued viability of the *Agins* standard outside that special context. *See* Appendix at 8-11.[5] Applying that standard, the

5. Petitioner's attempt to paint the Decision as an unexplained doctrinal change that deprived Petitioner of its reasonable expectation concerning the applicability of the "close nexus" requirement to Local Law 6, Petition, n.24, should be rejected. As the Court of Appeals explained, this Court's 1999 decision in *Del Monte Dunes* settled "considerable disagreement" on the subject among the judges of the Court of Appeals, the judiciary generally, and scholars. Appendix at 8.

Court held that "Local Law 6 easily qualifies as a valid regulatory denial of development pursuant to a generally applicable zoning law." Appendix at 11.

There is no genuine issue about whether Local Law 6 substantially advances each of the interests that it was enacted to achieve — maintaining open space, preserving area recreation opportunities, and avoiding increased flooding — and Petitioner has conceded the legitimacy of each of those governmental interests.

A. Open Space

Local Law 6 was enacted, in part, to maintain open space, which provides physical relief from development, reduces the adverse effects of over-building, preserves the suburban character of the Town, and sustains the Town's natural resources, including wildlife. *See* R142; R227. The Recreation Zone substantially advances these ends by prohibiting the dense residential development (single family homes on 30,000 square foot lots) permitted under the prior R-30 zoning.

It is undisputed that under R-30 zoning construction of as many as 125 dwelling units on the Property and as many as 285 units on the 280-acre Winged Foot Property would be possible. R631; R669-70. In addition, the residential zoning classification permitted destruction of all of the Golf Course Properties' open spaces to accommodate such development. *See* R631-32; R669-70; R157.

At no time during this litigation did Petitioner dispute the Town's analysis of the negative impacts of R-30 zoning on open space. Instead, Petitioner argues in the Petition, as

it did below, that it never considered such development, but rather intended to develop "71 clustered homes, leaving the bulk of the land devoted to the existing recreational use." Petition at 5,14. In fact, however, Petitioner applied for approval and expressed willingness to build a 130-unit residential subdivision that would have obliterated the golf course and preserved virtually no open space. *See* R1026-27; R1028-29.

Moreover, even if Petitioner's proposed subdivision in fact would have preserved some meaningful open space on the Property (which the record demonstrates it would not), the R-30 zoning that Petitioner prefers would not, and could not, ensure that result, since there is no requirement that open space (or even the appearance of open space) be preserved under R-30 zoning. Thus, R-30 zoning would leave the 430 acres subject to it (65% of which Petitioner has no control over) vulnerable to the type of development by Petitioner or environmentally insensitive transferees that would jeopardize the Town's open space goals. *See* R192-98; R631; R633; R639; R718.

Because R-30 zoning permits development incompatible with the Town's goal of preserving meaningful open space, while the Recreation Zone prohibits such incompatible use and permits uses that will preserve open space, Local Law 6 advances the Town's interests.[6] No closer causal relationship could be imagined.

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6. The Recreation Zone does not require that the Property remain "open and undeveloped," as Petitioner would have the Court believe. Petition at 4. Indeed, the Property is not undeveloped. For more than 70 years it has been developed as a commercial recreational facility, and Local Law 6 permits the Property to remain in its current commercial recreational use or to be redeveloped for other similar uses.

B. Recreational Opportunities

The Court of Appeals correctly determined that Local Law 6 also substantially advances the Town's interest in preserving recreational opportunities for area residents.[7] The only principal uses permitted by Local Law 6 are commercial recreation facilities, including golf, tennis and swim clubs, and other similar uses. R227-28. Public playgrounds and parks are also permitted by special permit. R228. Since recreation is the exclusive permitted use in the Recreation Zone, while the principal permitted R-30 use was single-family dwellings, Local Law 6 substantially advances the Town's goal of preserving recreation facilities and opportunities for Town and area residents.[8]

C. Avoiding Increased Flooding

Finally, Local Law 6 substantially advances another legitimate Town interest — avoiding increased flooding. The Town is situated on a steep incline at the bottom of an almost

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7. At the time of the rezoning, 70% of Bonnie Briar's membership resided within a five mile radius of the club. R144.

8. Petitioner suggests that Local Law 6 does not accomplish the Town's recreation goals because "the golf course was private and open to members only." Petition at 4. "The assumption that, because property is designated for private recreational use, it lacks public value and that its subsequent withdrawal has no public impact is flawed as a matter of logic." *Ehrlich v. City of Culver City, et al.*, 12 Cal. 4th 854, 878-79, 911 P.2d 429, 445 (Cal.), *cert. denied*, 519 U.S. 929 (1996). The opportunity for area residents to use the Golf Course Properties is a public benefit because it enlarges the availability of recreational facilities. *See id.* "Without such . . . facilit[ies], residents would have to travel farther, wait longer, and put up with other inconveniences and restricted choices in their recreational pursuits." 12 Cal. 4th at 879, 911 P.2d at 445-46.

fully developed watershed. *See* R628. Consequently, it is vulnerable to flooding from upstream land uses, which are outside the Town's control. It is undisputed that "substantial flooding and sewerage backup in homes is common during periods of heavy rain." *See, e.g.*, R627. Because of their location, the Golf Course Properties act as natural detention basins for the Sheldrake River, curtailing the frequency and extent of flooding in these homes. *See* R628.[9]

Local Law 6's coverage restrictions severely limit the amount of impervious surface that may be constructed on the Golf Course Properties. Any residential development of the Golf Course Properties would increase flooding in Town homes. *See* R442 and R456. Because Local Law 6 prohibits such development, it substantially advances the Town's goal of avoiding development that would increase flooding in the Town.[10]

* * * *

Even if this Court were to disagree with the degree of causal connection required by the Court of Appeals in determining whether Local Law 6 effects a taking, it should

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9. Petitioner's assertion that the Property functions as a "catch basin for waters diverted from elsewhere in the Town", Petition at i, is simply untrue. Due to the area's topography, water naturally flows to the Golf Course Properties; it is not diverted there by artificial means.

10. Petitioner's argument that Local Law 6 is not necessary to protect the Town from increased flooding because the existing regulatory scheme prohibits increases in runoff from new developments is nothing more than a variant of its argument, addressed in Point III below, that Local Law 6 is not necessary to the effectuation of the Town's goals.

deny the Writ nonetheless because there has already been a judicial determination by an appellate court that Local Law 6 survives more stringent scrutiny. Applying *Nollan*'s "essential nexus" requirement, the New York Supreme Court, Appellate Division held that Local Law 6 does not effect a taking because it accomplishes precisely the legitimate government objectives that it was enacted to advance. *See* Appendix at 15. Thus, the Court's clarification of the appropriate legal standard, even if it differs from that adopted by the Court of Appeals, would not assist in resolving this case. The facts of this case do not provide a satisfactory context in which to explicate the appropriate legal standard, because, as demonstrated above, Local Law 6 satisfies any conceivable standard.

III.

THE COURT SHOULD DENY THE WRIT BECAUSE THERE IS NO LEAST RESTRICTIVE ALTERNATIVE REQUIREMENT IN ZONING

In Point III, Petitioner asserts that the Decision conflicts with other court decisions by holding that Local Law 6 substantially advances the Town's goals because it bears a "reasonable relationship" to those goals. *See* Petition at 22. Petitioner contends that this holding is contrary to *Penn Central*, which, it asserts, requires that a zoning regulation must be "necessary" to the accomplishment of a municipality's goal in order to satisfy the first prong of the *Agins* test. There is no such conflict, however, because Petitioner misreads *Penn Central* and tries to establish a least restrictive alternative requirement that is contrary to this Court's decisions and the very essence of zoning.

Petitioner's argument that this Court has adopted a so-called "necessity requirement" in assessing regulatory takings claims is premised solely on *dicta* in *Penn Central*. *See* Petition at 22 (citing 438 U.S. at 127). In discussing the earlier case of *Goldblatt v. Hempstead*, 369 U.S. 590 (1962), the Court stated in *dicta* that "[i]t is, of course, implicit in *Goldblatt* that a use restriction on real property *may* constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose." *Penn Central*, 438 U.S. at 104 (emphasis added).[11] The Court did not make "necessity" a required part of a regulatory takings analysis. Rather, the Court held that the regulation at issue, New York City's Landmark's Law, did not effect a taking because "[t]he restrictions imposed are substantially related to the promotion of the general welfare. . . ." Moreover, in its land use regulatory takings cases since *Penn Central*, the Court has not interpreted this language to mean that, in order to pass constitutional muster, a zoning change must be the *only* way to achieve its stated goals.[12] Accordingly, Petitioner's reliance on *Penn Central* is misplaced.[13]

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11. The court's *dicta* is, in any event, equivocal: it does not imply that a lack of "reasonable necessity" *ipso facto* or automatically or invariably constitutes a taking, only that it might.

12. Indeed, in *Nollan*, the Court made clear that *Penn Central*'s "reasonably necessary" language is merely another formulation of the *Agins* "substantially advance" test. *See Nollan*, 483 U.S. at 843 n.1

13. Petitioner's reliance on *Penn Central* is misplaced for the additional reason that it ignores the modifier "reasonably", which precedes the word "necessary." A regulation "reasonably necessary" to the accomplishment of a goal may be one of a number of ways of achieving it, while a regulation "necessary" to the accomplishment of the goal is an indispensable means of achieving it.

Moreover, Petitioner's argument that Local Law 6 is not necessary to achieve the Town's goals misdirects the inquiry. It focuses the Court's analysis exclusively upon a comparison between the new zoning district and one of an infinite number of alternatives in the array of R-30 development possibilities that ostensibly is most consistent with the goals of the rezoning and least restricts Petitioner's use of the Property — the 71-unit R-30 cluster development contemplated in one of Petitioner's proposed subdivision plans. Petitioner suggests that Local Law 6 substantially advances the Town's interests only if the rezoning is more protective than that subdivision plan because otherwise it would be superfluous in achieving the Town's goals.[14] Petitioner's argument is wrong for four reasons.

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14. Although Petitioner argued below that this determination could be made as a matter of law on its summary judgment motion, in this Court it now contends that such a determination can be made only after an evidentiary hearing. *See* Petition at 24. As explained in Point IV below, having moved for summary judgment and having failed to request such a hearing on the issue of whether Local Law 6 substantially advances the Town's interests, Petitioner cannot now argue that a hearing is required.

Also unsupported by the record is Petitioner's further contention that an evidentiary hearing is "critical" in light of the "sudden and dramatic destruction of [Petitioner's] distinct investment-backed expectations" resulting from the enactment of Local Law 6. Whether Petitioner had reasonable investment-backed expectations of residential development is a factual question not reached by the courts below, because the Appellate Division held that Local Law 6, as a matter of law, did not deprive Petitioner of economically viable use of the Property. Appendix at 13-14. Petitioner did not appeal that determination to the Court of Appeals. Moreover, during discovery Petitioner was unable to produce any proof of its original investment in the Property in 1922, let alone establish a reasonable investment-backed expectation of developing the Property for residential use dating back to 1922, as it now alleges. R1134, 1150.

First, both this Court and the New York Court of Appeals have explicitly rejected the suggestion that courts must undertake a least restrictive alternative analysis in assessing whether legislation effects a taking. *See Keystone Bituminous Coal Ass'n v. DeBenedictus*, 480 U.S. 470, 488 n.16 (1987) ("[w]e do not suggest that courts . . . are to undertake 'least restrictive alternative' analysis" in determining whether a regulation effects a taking); *Northern Westchester Prof'l Park Assocs. v. Town of Bedford*, 60 N.Y.2d 492, 501, 470 N.Y.S.2d 350, 355 (1980) ("the fact that the property would have a much greater value if zoned for less restrictive use . . . is not enough"). Thus, there is simply no basis for importing a least restrictive alternative requirement into the *Agins* test.

Second, a least restrictive alternative requirement is inappropriate because it attempts to collapse the second prong of the *Agins* test into the first prong. It rests on the premise that, even if zoning legislation substantially advances a legitimate government interest, it may nonetheless be invalid if it diminishes the value of the zoned property. This premise is clearly wrong as a matter of law and is an attempt to circumvent the stringent requirements of the second prong of the *Agins* standard. A zoning regulation that substantially advances a legitimate governmental interest does not effect a taking unless it deprives the owner of economically viable use of the land. *See, e.g., Lucas*, 505 U.S. at 1016; *Keystone Bituminous Coal Ass'n*, 480 U.S. at 495; *Agins*, 447 U.S. at 260. Petitioner's own appraisal establishes beyond question that Local Law 6 is not confiscatory. R.1411.[15]

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15. As explained above, the Appellate Division held that Petitioner's own appraisal demonstrated that Local Law 6 does not deprive Petitioner of the economically viable use of the Property. Petitioner did not appeal that determination to the Court of Appeals. (Cont'd)

Third, a least restrictive alternative requirement conflicts with the essence of zoning. The primary goal of zoning "is to provide for the development of a balanced, cohesive community which will make efficient use of the Town's available land." *Gernatt Asphalt Products, Inc. v. Town of Sardinia*, 87 N.Y.2d 668, 683, 642 N.Y.S.2d 164, 173 (1996). Thus, it is well-settled that a landowner has no vested right to the existing zoning of its property where, as here, the Town Board has rationally exercised its police power and determined that a change in zoning is required for the well-being of the community. *See id.*, 87 N.Y.2d at 684, 642 N.Y.S.2d at 174.

The zoning power requires the legislature to divide the community into use and bulk districts that create and maintain a land use pattern that benefits the community as a whole. In so doing, the legislature must balance the benefits and burdens of such classifications generally, but it need not, and indeed cannot, consider the benefits and burdens imposed by such classifications on each individual property owner. The precision urged by Petitioner is neither necessary nor possible in the proper exercise of the zoning power. *See Keystone Bituminous Coal Ass'n.*, 480 U.S. at 487 n.16 ("[t]hat a land use regulation may be somewhat overinclusive or underinclusive is, of course, no justification for rejecting it") (citing *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 388-89 (1926) (upholding constitutionality of zoning classification prohibiting innocuous as well as offensive industrial uses from district)); *Sproles v. Binford*,

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(Cont'd)

Appendix at 6; Petition at n.5. Thus, Petitioner's least restrictive alternative argument is, in this respect, an attempt to smuggle into the Petition economic considerations that were not before the Court of Appeals and, therefore, are not before this Court.

286 U.S. 374, 388 (1932) ("To make scientific precision a criterion of constitutional power would be to subject the state to an intolerable supervision hostile to the basic principles of our government. . . .").

Evaluating a generally applicable zoning regulation in the manner suggested by Petitioner would reverse these well-settled rules. Requiring that the *Agins* standard be applied to zoning restrictions like Local Law 6 by determining separately for each affected property whether the approved rezoning is the least burdensome way of achieving the legislation's objectives would prevent a municipality from zoning in the best interests of the community. It would be required instead to zone in the best interests of each individual landowner.[16] This would change radically the nature of the zoning power and, as a practical matter, give landowners vested rights to existing zoning.

Moreover, if each property owner were entitled to the zoning classification that least restricts the use of its property, courts would be in the position of second-guessing legislators on quintessentially legislative matters. *See Illinois Elections Bd. v. Socialist Workers Party*, 440 U.S. 173, 188-189 (1979) (Blackmun, J., concurring) ("A judge would be unimaginative indeed if he could not come up with something . . . a little less 'restrictive' in almost any situation, and thereby enable himself to vote to strike legislation down."). Such analysis would interfere with the democratic process by transferring the ultimate authority over land use policy from elected bodies to judges and juries.

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16. This would amount to impermissible spot-zoning. *See Rodgers v. Village of Tarrytown*, 302 N.Y 115, 124 (1951) (relevant inquiry in determining whether classification constitutes illegal "spot zoning" is whether "it was accomplished for the benefit of individual owners rather than pursuant to a comprehensive plan for the general welfare of the community").

Fourth, in evaluating Local Law 6's prohibition of certain of the uses permitted under the prior zoning, courts cannot be forced to consider only how the present owner says it would use the land. Neither the present owner nor any future owners of either of the Golf Course Properties is bound by such a statement of intentions; indeed in this case Petitioner submitted, simultaneously with its allegedly preferred plan, an alternative subdivision plan that would have obliterated open space and recreation use of the Property. Since a zoning ordinance "in the very nature of things has reference to land rather than to owner," *Vernon Park Realty v. City of Mount Vernon*, 307 N.Y. 493, 500 (1954) (citation omitted), a municipality is obligated to select the zoning classification that will ensure the fulfillment of the its goals, regardless of the identity of the owner, now or in the future. In order to determine whether the challenged zoning "substantially advances" the Town's goals, courts must look beyond a single possible development scenario and the stated intentions of present owners and consider the full range of uses permitted under the prior zoning that the challenged zoning prohibits.

The Court of Appeals properly rejected Petitioner's unprecedented and conceptually flawed argument for application of least restrictive alternative analysis. Accordingly, that issue does not merit this Court's review.

IV.

BECAUSE PETITIONER FAILED TO IDENTIFY A SINGLE MATERIAL FACT IN DISPUTE CONCERNING THE VALIDITY OF LOCAL LAW 6, THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND DEL MONTE DUNES ON THE ISSUE OF WHETHER A TAKINGS CLAIM CAN BE DECIDED AS A MATTER OF LAW

In Point IV, Petitioner argues that because the Court of Appeals held as a matter of law that Local Law 6 substantially advances legitimate Town interests, rather than requiring a trial on unspecified disputed facts, the Decision conflicts with the procedure purportedly approved by this Court in *Del Monte Dunes*, which permits a property owner to submit proof at trial. Petition at 27-28. This argument should be rejected because it is based on a complete misapprehension of the record and the procedural history of this case.

Petitioner asserts, without citation to the Record, that the facts concerning the validity of Local Law 6 are "in dispute." Petition at 28. This is simply not true. In fact, Petitioner moved for summary judgment on the question of whether Local Law 6 substantially advances legitimate Town interests, R.22-23, and submitted the Affirmation of Stuart R. Shamberg, its counsel, stating that "there exist no triable issues of material fact regarding the terms of Local Law No. 6, its purposes and effects, and that the objectives thereof are already addressed and protected under other, less onerous state and local regulations." R31. In opposing the Town's subsequently filed cross-motion for summary judgment, R605, Petitioner renewed its request for summary judgment and failed to allege a single disputed fact precluding the grant of summary judgment in favor of the Town. *See* R849; *see generally* R848-983.

Thus, the Court of Appeals did not, as Petitioner contends, "refuse[] to permit Bonnie Briar to produce evidence on the lack of necessity" for Local Law 6, Petition at 29. Rather, Petitioner never sought such permission. Instead, it maintained throughout the proceedings below that there were no material facts in dispute concerning the validity of Local Law 6 and it has identified none here. Where, as here, the facts are not in dispute, summary disposition as a matter of law is appropriate. Even Petitioner agrees. Petition at 28. Accordingly, there is no conflict between the Decision and *Del Monte Dunes* warranting this Court's review.

CONCLUSION

The Court should deny the Writ because, as the Court of Appeals correctly determined, Local Law 6 does not effect a taking of the Property, and the issues raised in the Petition do not merit this Court's review.

Respectfully submitted,

ROBERT S. DAVIS
Counsel of Record
JAMES M. ALTMAN
JUDITH M. GALLENT
ROBINSON SILVERMAN PEARCE
ARONSOHN & BERMAN LLP
Attorneys for Respondents
1290 Avenue of the Americas
New York, New York 10104
(212) 541-2000